IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

71-1250

Supreme Court, U. S.
FILED
SEP 1972

DERMOTT NOONAN,

Petitioner,

—against

MIDLAND CAPITAL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Dermott Noonan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 4, 1972.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit, 453 F. 2nd 459 (1972), is appended hereto (App. pp. 6a-12a). The unreported opinion of the U. S. District Court for the Southern District of New York is also appended hereto (App. pp. 1a-5a).

Jurisdiction

The judgment of the panel of the Court of Appeals for the Second Circuit sought to be reviewed was entered January 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether upon the evidence of disputed facts the direction of a verdict for the respondent was in violation of petitioner's right to a trial by jury and conflicted with the decisions of this court.

2. Whether upon the admitted facts was the finding of a verdict for the respondent wrong as a matter of substantive law, being in direct conflict with the applicable and controlling law of *Davis* v. *Patrick*, 141 U.S. 479, 489, and like cases substantially indistinguishable.

These questions are raised by the evidence which follows:

Solely on respondent's request and for respondent's benefit, and for payment at the rate agreed to by respondent, petitioner performed the services requested by respondent in relation to a very substantial debtor of respondent, which debtor was known by both parties to be hopelessly insolvent and without any funds to pay for petitioner's services. Petitioner was told by respondent that it would send the insolvent debtor the funds needed to pay for petitioner's services. Petitioner's services for the first two months were so paid. Petitioner has not been paid for his services thereafter.

Petitioner sued respondent for payment. The issue to be tried was stipulated in the pre-trial order as:

> "Was there an oral agreement between plaintiff and defendant by which plaintiff was to perform services and defendant was to compensate plaintiff for such services:"

On the trial it was defendant's position that, "as a large creditor, it was intensely interested in helping Textured (the Georgia company) to revive and survive, but that it never went further than to agree to lend additional funds from which the debtor could pay plaintiff along with its other operating expenses." (cf. Court of Appeals' opinion, App. p. 11a).

The jury after prolonged deliberation was unable to agree on a verdict and was discharged. Thereupon petitioner moved for a new trial, which was denied; and the respondent moved for a directed verdict in its favor which the Court subsequently granted. The directed verdict has been affirmed by the Court of Appeals.

The Constitutional Provision Involved.

The Constitutional provision involved in the case is the Seventh Amendment to the Constitution of the United States which reads as follows:

> "AMENDMENT [VII]: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statement of the Case

A. The Basis for Federal Jurisdiction

The federal jurisdiction in the court of first instance is based on the amount involved and on the diversity of citizenship of the parties, the petitioner being a citizen of the State of New Jersey and the respondent being a New York corporation with its principal offices in the City of New York.

B. The Facts to April 10, 1967

Respondent, which is engaged in the business of making loans, financed Textured Products Company, a Georgia-based manufacturer, from the time of its formation in 1966.

In March 1967 the unpaid advances of Midland to Textured amounted to $850,000 against which Textured had pledged its capital stock.

Textured was then insolvent and in default on Midland's advances and was at that time making a request of Midland for additional advances of $740,000 it stated it needed to continue operations over the next 90 days.

The president of Midland Capital, C. Edgar Schabacher, after receiving this request from Textured telephoned the petitioner, Dermott Noonan, a management consultant and a certified public accountant, and asked to consult with petitioner regarding this request by Textured Products.

The petitioner had no prior contact with Textured Products nor knowledge of Midland's relationship to Textured. After briefing Noonan as to the up-to-date financial situation between Midand and Textured, Schabacher asked Noonan to go down to Textured's plant in Georgia and report back to him as to the condition at Textured Products as it related to the request for an additional advance of $740,000.

Noonan did so and at Schabacher's request returned a second time and reported again to Schabacher on April 10, 1967, to the effect that, besides owing Midland $850,000, Textured also owed $30,000 for insurance, owed $50,000 on a defaulted note to a local bank secured by Textured's inventory of raw material, was behind in all its accounts payable, had only $300 left in its bank account and could not continue in business without further advances by Midland. Noonan further reported that $240,000, rather than the $740,000 requested, would be necessary to carry Textured for an additional ninety days, $50,000 of which was needed immediately.

Schabacher then stated he was not ready to give up on the investment[1] and asked Noonan if he would undertake the supervision of the financial operations of Textured Products

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1. The testimony on this is set forth in the Appendix, page 14a, *infra*.

for an initial period of three months during which time Midland could decide whether to make further advances to continue the manufacturing operations of Textured.

There then occurred the following conversation, which is described in the opinion of the Court of Appeals (App. p. 9a) as follows:

> "Noonan testified "*that Schabacher agreed that Patrick*[1] *would go down to Textured Products on April - - the next day April 19, what it was, and take over the operations of the plant*[2], that Midland Capital would * * * authorize advancing of funds to Textured Products for operations, based upon a schedule to be submitted by the people at Textured Products and approved by me (Noonan)"; that "I advised Mr. Schabacher that our fee would be $7,500 a month * * * which was perfectly satisfactory to Mr. Schabacher" who said, "Fine"; that "in as much as Textured had no funds, insofar as the payment is concerned, that the funds would be furnished by Midland Capital to Textured Products in the sum of $7,500 to pay our fee when the bills were submitted, and the $7,500 would be added onto and over and above the operating fee – the operating sums needed for the daily operations * * *"; and that funds were in fact transmitted from Midland to Textured. Again, Noonan testified that Schabacher urged him "to take on this undertaking, that, in order to accomplish this they would supply the necessary funds for the operation of the plant and for the payment of the fees which would be $7,500 a month" and which were to be paid to plaintiff."[3]

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1. Patrick was a production engineer associated with Noonan.

2. The words in italics were "filtered testimony" and are indicated in the Court of Appeals' opinion by three (3) asterisks. (cf. Excerpt from Record, App. p. 15a).

3. It was understood that Noonan would pay $4,000 of the $7,500 fee to Mr. Patrick for his services.

C. The Events After the Agreement of April 10, 1967

The day after this agreement was made with Schabacher, Mr. Patrick, a colleague of the petitioner and a production engineer, went down to Georgia to take over the operations of the plant.

This is reflected in a letter of Textured Products Company, *dated April 24, 1967*, referring to petitioner and Mr. Patrick as "hired by Midland." This letter was introduced into evidence at the trial (App. p. 13a).

Petitioner took over the supervision of Textured's requests for advances for the other necessary current operational expenses of Textured and the disbursements of such advances when received.

When Noonan put in his first bill in Georgia, he notified Midland, asked that the $7,500 be sent down to pay the bill, which Midland then did and the bill was paid. (App. p. 17a). The same procedure was followed on Noonan's bill for the May services, which was paid on July 10, 1967.

Textured's business failed to improve. At the meeting on August 6, 1967 held in New York City, attended by Textured Products and petitioner, it was decided by Schabacher to give up on further manufacturing operations of Textured and that neither petitioner nor Patrick need return to Georgia. Thereafter petitioner worked on voluminous reports and presentations at the request of Schabacher for respondent's use in promoting the sale of Textured Products. The last such report by petitioner was delivered to Midland in October 1967.

Petitioner had still not received payment for the services he rendered in June, July and August, and several times in September, October and December of 1967 petitioner asked Schabacher for payment, to which Schabacher replied "Please be patient, we are selling the plant, and please be patient".[4]

Not until after this suit was started did Midland make any

4. The testimony regarding this is set forth in the Appendix pages 18a and 19a, *infra*.

disclaimer or denial of responsibility of payment for petitioner's services.

Suit was filed by petitioner against respondent for breach of contract in the U. S. District Court for the Southern District of New York in March 1968, and the trial of the action started June 1, 1970. The jury started deliberation on June 4, 1970 and the next day continued its prolonged deliberation and then reported itself unable to agree upon a verdict and was discharged by the court. [5]

The petitioner then moved that the case be remanded to the calendar clerk for retrial. The Trial Court declined. Respondent then made a motion for a directed verdict in its favor. Respondent's motion was granted by the District Court on December 1, 1970.

REASONS FOR GRANTING WRIT

I.

The directed verdict here conflicts with this Court's decisions that the direction of a verdict by a court on disputed issues of fact violates a litigant's constitutional right to have issues of fact decided by a jury. It constitutes error for the correction of which this Court's writ of certiorari will issue.

It is unnecessary to refer at length for authority that a litigant in an action at law has the inviolable constitutional right to require that disputed issues of fact be decided by a jury. As this Court said in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 68; "Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

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5 . Excerpts from the charge to the Jury are set forth in the Appendix, page 20a.

Nothing in Rule 50b of the Federal Rules of Civil Procedure gives the trial court the power to do otherwise. As this Court has said in *Berry* v. *United States,* 312 U.S. 450, at page 453:

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact, a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts:"

Where facts are in dispute and the relevant evidence is such that fair minded men may reasonably draw different inferences and reach different conclusions therefrom, the determination of the issues of fact is required to be made by the jury, not the Court. *Baylis* v. *Travellers' Insurance Company,* 113 U.S. 316; *Berry* v. *United States,* supra; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U.S. 54, 68; *Continental Co.* v. *Union Carbide,* 370 U. S. 690, 696; *Gallick* v. *Baltimore & Ohio R. Co.* 372 U. S. 108, 115.

Where the evidence would permit reasonable men to reach different conclusions the direction of a verdict by the Court violates the constitutional right of a litigant and is error for the correction of which this Court will issue its writ of certiorari, *Wilkerson* v. *McCarthy,* 366 U.S. 53, 70; *Tennant* v. *Peoria etc. Co.,* 321 U.S. 29.

In *Wilkerson* v. *McCarthy,* supra, on page 80, this Court said:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."

II.

The directed verdict squarely conflicts with the applicable principles of substantive law stated in *Davis* v. *Patrick*, 141 U.S. 479, and like cases which are substantially indistinguishable.

A.

This is a suit upon an oral contract for employment of petitioner's services. The pivotal issue is whether there was a promise by respondent to pay for such services. Where there is doubt as to the meaning of what was agreed to by the parties, the meaning and effect of the words used must be related to the surounding circumstances. As said in *Davis* v. *Patrick*, 141 U. S. 479, 489, a suit on an alleged oral agreement to pay for services rendered by plaintiff to a third party at defendant's request, "the real character of a promise does not depend altogether on the form of expression, but largely on the situation of the parties;".

It is elementary that a promise may be implied in fact from the meaning and effect of words when considered in relation to the surrounding circumstances; and where such a promise reasonably may be implied from the words related to the surrounding circumstances, it is as much a part of the contract as if it were expressed in *haec verba;* and this is true not only of oral agreements but also of written agreements[1].

The decisions of this Court are conclusive that where the services requested are furnished to a third party, and such services are mainly for the financial benefit of the one who requests the services, there is an implied *in fact* promise by the party requesting such services to pay for the services. This is an independent, direct and primary obligation, notwithstanding that

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1. Williston on Contracts (3d Ed.) Vol. 1, Sec. 90; *Wood* v. *Lady Duff Gordon* 222 N.Y. 88; *Grossman* v. *Schenker*, 206 N.Y. 466, which is noted with approval by this Court in the case of *Cullen Fuel Co.* v. *Hedger Co.*, 290 U. S. 88.

the third party may incidentally benefit from the services and also be obligated to pay therefor.

The decisions of this Court in *Davis* v. *Patrick*, 141 U.S. 479, and in *Emerson* v. *Slater*, 63 U.S. 28, are decisive and controlling. It appears in *Davis* v. *Patrick, supra*, that a mining company had made a contract to sell and deliver some 5000 tons of ore to Davis for which Davis had advanced £5000 to the mining company. Only 200 tons had been delivered. At that time Davis met Patrick, who told Davis the mining company owed him for transporting the ore. Davis asked Patrick to continue hauling the ore and told him that he, Davis, would see that Patrick was paid. Patrick continued to haul ore to Davis for which he later sued him. The question was whether the promise by Davis was a promise to pay for the debt of the mining company, on which Davis would only be secondarily liable and therefore unenforcible by the statute of frauds, or whether it was an independent, primary and direct obligation of Davis. In its opinion this Court, after quoting from its prior decision in *Emerson* v. *Slater, supra*, to the same effect, stated at pages 488, 489;

> "While the original promisor was the mining company, and the undertaking was for its benefit, yet the performance of the contract enured equally to the benefit of Davis and the mining company. Performance helped the mining company in the payment of its debt to Davis, and at the same time helped Davis to secure the payment of the mining company's debt to him; and as the mining company was apparently destitute of any other property, and the payment of its debt to Davis therefore depended upon the continued and successful working of his mine, and as the control and working of the mine had been put in the hands of Davis so that he might justly say, as he did, 'I am practically the owner', it follows that he was a real, substantial party in interest in the performance of this contract. His promise was not one purely collateral to sustain the obligations of the mining company but sub-

> stantially a direct and personal one to advance his own interests. While the mining company was ultimately to be benefited, Davis was primarily to be benefited by the transportation of the ore, for thereby that debt, which otherwise could not, would be paid to him. He therefore, in any true sense of the term occupied not the position of a collateral undertaker, but that of an original promisor, and it would be a shadow on justice if the administration of the law relieved him from the burden of his promise on the ground that it also resulted to the benefit of the mining company, his debtor."

The rule so stated by this Court in *Davis* v. *Patrick*, *supra*, is settled beyond question. The *Davis* case, *supra* has been often cited and followed by the Federal and the State courts. It is the law of New York which is here applicable, since the agreement for petitioner's services was made in New York[2]. It is the rule stated in the Restatement of the Law of Contracts (cf. Section 90).

B.

The evidence here, if believed by a jury, would certainly reasonably permit the inference that Midland agreed to pay for Noonan's services.

The undisputed evidence shows that: Noonan's services were performed solely upon Midland's request; the services were performed solely for the benefit of Midland; Textured was hopelessly insolvent and without funds to meet even its minor current obligations; Noonan had no previous contact with Textured, nor any financial interest in Midland Capital Corporation or in Textured's survival; the rate of Noonan's compensation was fixed with Schabacher and his services with

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2. Cf. *Rosenkranz* v. *Schreiber Brewing Co.*, 287 N.Y. 322, 325; *Kernochan* v. *Murray*, 111 N.Y. 306.

respect to Textured were the services prescribed by Schabacher; Schabacher stated to Noonan that Midland would make the advances of money needed to pay Noonan, when his bills were submitted; both Noonan and Midland knew that Textured would be unable to pay Noonan unless Midland put up the money required for that purpose; there is no evidence that Midland had any obligation to Textured to continue making advances.

From these facts there is implied in fact under the settled principle of *Davis*, supra, the promise by Midland to pay Noonan; and a jury reasonably could have so found. For to conclude otherwise transcends reasonable belief. Noonan, as the opinion of the District Court states, is "a certified public accountant, has worked some years as a management consultant. - - - He has held important corporate posts. He is sophiscated in business affairs." Both he and Midland knew that Textured was insolvent and could not pay Noonan's salary. Can there be any doubt whatever that if Schabacher, Midland's president, had suggested that Noonan could look only to Textured for payment of his agreed compensation, that Noonan would have rejected Schabacher's proposal out of hand, or that Schabacher reasonably would have expected Noonan to do otherwise?

The direction of a verdict against respondent, and the affirmance thereof, necessarily assume that Noonan, a man experienced in business affairs, agreed to perform services for the benefit of Midland without any promise of Midland to pay for such services and without any promise by Textured to pay him, and that in performing such services Noonan was willing to rely for payment on a possible claim against a hopelessly insolvent corporation that would be unable to pay him. Surely a jury reasonably could have found otherwise.

C.

Had the Court of Appeals affirmed without opinion, or if its opinion were not now part of the official reports, and therefore an authoritative precedent in District Courts in the Second Circuit, no great harm might result from its decision other than the prejudice to petitioner in denying him the constitutional right to a trial by jury on evidence from which a jury reasonably could have rendered a verdict in his favor.

It plainly appears on the face of the Court of Appeals' opinion that, in disregard of this Court's decisions, its decision was reached upon a filtering of the parties' testimony if not an outright questioning of credibility, the drawing of inferences of fact adversely to petitioner and a weighing of the effect of its own inferences from the facts to reach a dubious conclusion. The *Noonan* decision is therefore contrary *in principle* and practice to the decisions of this Court.

That the Court of Appeals plainly reached its decision by a process of questionable inferences and a weighing of evidence is to be seen from the opinion itself which states:

> "Against this compelling evidence for defendant, plaintiff marshals some *items* which, at best, *are as consistent with appellee's view as with appellant's*" (App. p. 10a).

and then the opinion summarizes the five "items" of evidence in language which may be misleading.

Thus, the first item is stated as follows: "(1) Midland *invited* him into the Textured matter and initiated the talks with him." Does not "invited" suggest something other than a request to Noonan to perform services for a wholly insolvent company which had no funds of its own to pay him for what such "invitation" asked him to do?

The next "item," as stated in the opinion, is: "(2) Midland urged him to go to Georgia to look over Textured's situation and then try to help that company." From this language it is difficult to infer the fact that Midland asked Noonan to per-

form services for three months at the agreed compensation of $7,500 a month, the prime purpose of such services being his supervising and reporting to Midland of the facts which would enable Midland to decide what future advances Midland should make to Textured in addition to the $850,000 already owing.

The same process of filtering the evidence through unwarrantable inferences to reach questionable conclusions is followed throughout the opinion. The very opinion of the court below weighed the evidence, passed upon its effect, inferred and "harmonized" upon it, construed the meanings of the words used by the parties and, at the end of it all, entered a judgment in the case on its own view of evidence.

The question here is not, however, whether the court made the proper inferences and drew the proper conclusions of fact, but only whether a jury reasonably could have drawn different inferences and conclusions and found that Midland promised to pay Noonan for the services rendered by him.

What the Court of Appeals here did in arguing in support of the directed verdict by the District Court has been condemned repeatedly by this Court. In *Baylis* v. *Travellers' Insurance Co.*, 113 U.S. 316, 320, where, in an action on an insurance policy, the trial court having directed the jury to bring a verdict for defendants, this Court declared:

> "But, without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.
>
> "This is what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and *when properly ascertained*, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains

that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as *it* might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury.

"The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution, and Congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Rev. Stat. §§ 648, 649.

"This constitutional right this court has always guarded with jealousy. *Elmore* v. *Grymes*, 1 Pet. 469; *De Wolf* v. *Rabaud*, 1 Pet. 476; *Castle* v. *Bullard*, 23 How. 172; *Hodges* v. *Easton*, 106 U.S. 408."

So, too, in *Tennant* v. *Peoria & P. U. R. Co.* 321 U.S. 29, where the Court of Appeals had reversed a jury verdict for insufficient evidence this Court, in reversing the Court of Appeals, stated:

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. * * * It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (citing cases)."

Conclusion.

The rules so stated with respect to direction of a verdict, are supported by an entire host of opinions by this Court. In this case the rules have been ignored by the courts below and petitioner's Constitutional right to trial by jury has been violated.

The true meaning of the constitutional right to a jury trial, as in all of the Bill of Rights, appears not so much from the words in which it is expressed but, rather, from the manner in which it is applied. In this, the *Noonan* case, it has been applied in such a manner as to make it virtually meaningless. So long as it stands unreversed it stands as a false beacon by which litigants and courts may be misled and come to wreck.

For all the foregoing reasons it is respectfully prayed that a writ of certiorari of this Court issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated January 4, 1972, which affirmed a judgment entered in the United States District Court for the Southern District of New York granting the respondent's motion for a directed verdict against the petitioner.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DERMOTT NOONAN,

Plaintiff,

against

MIDLAND CAPITAL CORPORATION,

Defendant,

FRANKEL, D.J.:

After three days of trial and two days of deliberation, the jury was unable to agree upon a verdict in this case. Renewing a timely motion for a directed verdict, defendant has moved for judgment in its favor. Plaintiff opposes that motion and has moved that judgment be awarded in his favor*. The court has concluded that defendant's motion should be granted.

Plaintiff, a certified public accountant, has worked for some years as a management consultant. He is as his briefs now stress, a man of considerable education. He has held important corporate posts. He is sophisticated in business affairs.

Defendant is a Small Business Investment Corporation. In late 1966 and early 1967 defendant made large loans to Textured Products Company of Georgia. Contrary to the expectations of all those interested, Textured Products did not prosper. By the spring of 1967 it had lost a great deal of money, and its imminent demise was a substantial possibility. Defendant's Chairman, Schabacher, invited plaintiff to consider a program

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* *This statement is erroneous. The plaintiff did not move for judgment in his favor but, rather, asked that the case be remanded to the Trial Calendar Clerk for reassignment. This corrective note was made in the Second Circuit Court of Appeals without objection by the respondent.* (*Pet. Note*).

of what the latter describes as "participative management"—i.e., to move into Textured Products plant, along with colleagues in his management consulting business, in order (1) to determine whether the Textured Products operation could be salvaged and (2) to assist in the salvaging. After two visits to the Georgia plant in late March and early April of 1967 plaintiff reported to defendant that there might be hope for Textured Products. Plaintiff proposed to go personally to Georgia for substantial portions of his time, taking an associate to spend full time there, and to strive over a three-month period to discover a method for reviving Textured Products. In order to keep Textured Products functioning during the period of this rescue attempt, defendant agreed to lend it large sums for its operating expenses. Such advances, between April and August, 1967, reached a total of $200,000 to $250,000 which appears never to have been repaid. Indeed, defendant seems to have lost over $1,000,000 in the Textured Products venture.

Plaintiff and his firm proceeded to work in Georgia in earnest during the week of April 10, 1967. He rendered bills for his services during the months of April through October to Textured Products. (The court has already ruled that there was no evidence of work done for the September and October bills.) Textured Products paid plaintiff's bills for April and May out of funds advanced by defendant, and paid an additional $2,500 in October, when defendant was no longer making advances. Defendant had previously recommended to another company in which it had invested the hiring of plaintiff, and plaintiff's billings to (and payments from) Textured Products duplicated the course he had followed in that earlier employment.

After plaintiff had worked with Textured Products for some three months, various interested persons—plaintiff, one of his colleagues and people representing both defendant and Textured Products—held a meeting in a New York hotel, on August 6, 1967, which ended with a decision to recognize that Textured Products was, in plaintiff's phrase, "a terminal case." Opera-

tions in the Georgia enterprise had largely ended over a month before. Neither plaintiff nor anyone in his firm ever returned to the Georgia scene, and Textured Products continued toward its total expiration in 1968. Between the hotel meeting and the end of August, 1967, plaintiff prepared and gave defendant two reports on the Textured Products fiasco. He continued until late 1967, though it proved futile, to render bills to Textured Products for his services. It is stipulated, contrary to plaintiff's assertion on the witness stand, that he never tendered any bill to defendant for his services until January 8, 1968, long after the inability of Textured Products to pay him anything more had become patent.

Plaintiff in his post-trial memorandum lists four trial issues. It is enough to take here the first two; the record, adverse to plaintiff on both, requires dismissal of his complaint. As plaintiff states them, these questions are:

> "(1) Did NOONAN and MIDLAND enter into an oral contract, i.e., were the facts, taken in totality such that the jury could infer therefrom and find that an agreement existed between the parties whereby MIDLAND agreed to engage NOONAN to perform certain consultant services for it and the latter agreed to perform same, all at agreed amount of compensation?
>
> "(2) If such a contract was found, was MIDLAND a primary obligor of NOONAN or a guarantor of the obligations of TEXTURED?" (Plaintiff's Post-Trial Memorandum pp. 4 and 5.)

Viewing the evidence, as we must for this purpose, in the light most favorable to plaintiff, giving full credence to his rarely laconic and frequently discursive testimony, and assuming all debatable inferences his way, the court concludes that no jury of reasonable and fair-minded people exercising impartial judgment could find a verdict in his favor. There is not a scintilla of evidence that defendant ever agreed, either as

primary or secondary obligor, to be liable to pay plaintiff for his consulting services rendered and billed by him to Textured Products. As defendant stresses, any agreement by it to act as guarantor, if oral, would be invalid in any event under the statute of frauds. But there was no oral agreement to that effect anyhow. And there was, more certainly, no agreement by defendant as primary obligor.

Plaintiff was, in his contemporaneous characterization of the relationship supplied for the information of interested and affected people, plainly and simply retained by Textured Products upon the recommendation of defendant. In plaintiff's own words: "At the recommendation of Midland Capital Corporation—Textured Products Corporation • • • retained Executive Management Services International as consultants to review the problems of the company in the areas of production, sales, and finances."•

Plaintiff says it is absurd to suppose he would have contracted with, and looked for payment to, a desperately sick enterprise like Textured Products. But there are clear and decisive answers to this suggestion that he "must have" had a contract with defendant even though the evidence shows none. During plaintiff's employment, defendant loaned Textured Products $200,000 or more in additional funds. It seems to have been understood that these loans would serve to pay plaintiff as well as to defray other costs of continued operations by Textured Products. Plaintiff was in fact paid substantial amounts by Textured Products from defendant's advances. It may be that defendant could be held liable to plaintiff had it

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• The circumstances surrounding the writing of these words are significant: Textured Products' president was preparing plaintiff's check, in payment of the April bill, and he asked plaintiff how he should explain the payment to his board of directors. Plaintiff's response was to write out the quoted statement, in his own hand, saying, "Here, you can tell your Board of Directors this."

fallen short in its advances to Textured Products. But that line of conjecture does not help plaintiff; there is no evidence that defendant fell short of any total it had promised to lend.

The decisive point remains, at any rate, that plaintiff has failed utterly to prove the agreement between himself and defendant upon which his suit is based.

Accordingly, defendant's motion is granted. The Clerk will enter judgment dismissing the complaint and awarding defendant its costs.

It is so ordered.

Dated: New York, New York
December 1, 1970

MARVIN E. FRANKEL

U.S.D.J.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 269—September Term, 1971.

(Argued November 10, 1971 Decided January 4, 1972.)

Docket No. 71-1130

DERMOTT NOONAN,

Plaintiff-Appellant,

v.

MIDLAND CAPITAL CORPORATION

Defendant-Appellee.

Before:

LUMBARD *and* FEINBERG, *Circuit Judges,*
and DAVIS, *Judge.**

Appeal from an order of the District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* dismissing after trial, on motion for a directed verdict and for judgment, a complaint alleging breach of a contract to pay for services rendered.

Affirmed.

JAMES P. COSTELLO, New York, N.Y. (John J. Lynch, of counsel), *for Plaintiff-Appellant.*

JOSEPH CHASE, New York, N.Y. (Cleary, Gottlieb, Steen & Hamilton and Edwin B. Mishkin, of counsel), *for Defendant-Appellee.*

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* Of the United States Court of Claims, sitting by designation.

DAVIS, *Judge*:

In this diversity case, Dermott Noonan, an experienced accountant and management consultant, sues Midland Capital Corporation, a small business investment company, for failing to fulfill an alleged oral contract to pay him for personal business services. The major defense is that no such agreement was ever made. The trial was to a jury which was unable to agree after prolonged deliberation. The defendant then renewed its motion for a directed verdict which was granted by Judge Frankel because there was no evidence from which a jury could reasonably find the purported agreement between Noonan and Midland underlying this action. We uphold the District Court.

The matrix of the claim is this:—in 1966 and the first part of 1967 Midland loaned large sums to an ailing Georgia manufacturer, Textured Products Company, taking the latter's stock in pledge. As the trial judge put it: "Contrary to the expectations of all those interested, Textured Products did not prosper. By the spring of 1967, it had lost a great deal of money, and its imminent demise was a substantial possibility." Appellant Noonan had previously worked with Midland on a comparable project to save another corporate debtor, and early in 1967 Midland's president, Schabacker, asked him to consult on Textured's problem. After a couple of visits to the Georgia plant, plaintiff advised Midland that the operation could be salvaged and that he was willing to assist. Midland, through Schabacker, agreed to this "rescue attempt." It was understood that Noonan himself would spend considerable time at the factory and would also retain a full-time production expert. For its part, defendant would lend Textured large sums for its operating expenses during this period, and this was done. Plaintiff's fee was set at $7,500 per month. He and his associates worked on the project for some months beginning in April 1967, but the Georgia firm was not to be saved. By June or July 1967 manufacturing stopped there, and early in August the interested persons agreed that nothing more should or could be done. Plaintiff then prepared for Midland two reports on the matter.

Beginning in May 1967, Noonan submitted bills to Textured for his firm's work from April through October 1967.[1] Textured paid those for April and May, out of the funds advanced by Midland, and also an additional $2,500 in October (after the advances had stopped). Plaintiff sent Textured bills, which were not honored, until late in 1967, and in January 1968 first billed defendant for his unrecovered fees (which he sets at over $33,000). Defendant refused to pay and this suit resulted.

The case was tried and presented to the jury, with the concurrence of both sides, solely on the theory that there was an express oral agreement by Midland to pay Noonan, at the stated rate of $7,500 per month, for the services in connection with Textured, *i.e.* a direct, primary obligation on Midland's part, rather than Textured's being the direct and primary obligor. There was no attempt to show that Midland was secondarily liable if Textured, as primary obligor, failed to pay.[2] Nor was there any effort to prove that Midland breached its promise to make funds available to Textured. There was, moreover, neither a claim of a written contract nor a demand in *quantum meruit* for the value of services rendered. Plaintiff built his entire structure on the basis that Schabacker had verbally undertaken to have Midland itself pay the fee of $7,500 a month. It is the evidentiary strength of that foundation which is now before us, the dispositive issue being the sufficiency of the evidence to go to the jury.

We apply, of course, the accepted rule that "[w]hether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence

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1 The District Court found there was no evidence of any work done for the September and October bills.

2 Without objection, the District Court told the jury: "If you were to find in this case that there was an agreement only to be secondarily liable and no agreement by Midland to accept the primary obligation, then you would be required on the undisputed facts to return a verdict for the defendant against the plaintiff

to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him." *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir. 1970). See, also, *Diapulse Corp. of America* v. *Birtcher Corp.*, 362 F.2d 736, 743 (2d Cir. 1966); *Lifetime Siding Inc.* v. *United States*, 359 F.2d 657, 662 (2d Cir. 1966). It may be noted, in this diversity action, that the New York rule on the granting of directed verdicts, if it to be followed here (*Calvert V. Katy Taxi, Inc.*, 413 F.2d 841, 846 (2d Cir. 1969) accords with the general formulation. *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F.2d 911, 914-15 (2d Cir. 1962).

Under this standard, plaintiff's own version of his crucial conversation with Schabacker about the fee is quite enough, or at least very nearly so, to negative the existence of any undertaking by Midland to pay plaintiff for his services. Noonan testified that "Schabacker agreed • • • that Midland Capital would • • • authorize advancing of funds to Textured Products for operations, based upon a schedule to be submitted by the people at Textured Products and approved by me [Noonan]"; that "I advised Mr. Schabacker that our fee would be $7,500 a month • • • which was perfectly satisfactory to Mr. Schabacker" who said, "Fine"; that "in as much as Textured had no funds, insofar as the payment is concerned, that the funds would be furnished by Midland Capital to Textured Products in the sum of $7,500 to pay our fee when the bills were submitted, and the $7,500 would be added onto and over and above the operating fee—the operating sums needed for the daily operations • • • "; and that funds were in fact transmitted from Midland to Textured. Again, Noonan testified that Schabacker urged him "to take on this undertaking, that, in order to accomplish this they would supply the necessary funds for the operation of the plant and for the payment of the fees which would be $7,500 a month" and which were to be paid to plaintiff. This self-serving evidence shows that the most defendant did was, first, to urge plaintiff to shoulder the job of

attempting to salvage Textured, and, second to agree to make funds available to the beleaguered firm with which the latter could pay plaintiff and his associates.

There is considerable other evidence supporting this as the actual arrangement, rather than an undertaking by Midland to be directly liable: (1) Noonan's prior connection with defendant had involved management consulting services relating to another sick company in which Midland had a substantial financial interest, and in that instance he was paid by the debtor firm, not the defendant. (2) The parties stipulated that plaintiff reviewed the periodic requests from Textured to Midland for loan installments which were to cover the manufacturer's general expense "out of which plaintiff was to be paid"; he would therefore be, and was, able to monitor the funds flowing from Midland to Textured, so that his fees could be covered. (3) When Textured's president, about to pay Noonan on the latter's bill for April 1967, asked for an explanation to be shown to Textured's directors, Noonan wrote in his own hand, "At the recommendation of Midland Capital Corporation—Textured Products Corporation have retained Executive Management Service International [plaintiff's firm] as consultants to review the problems of the company in the area of production, sales and finances." (4) Noonan directed his invoices for compensation and expenses to Textured, rather than Midland, until after the latter had collapsed, and did not bill Midland until much later. (5) He received payment from Textured on his first two bills to that company.

Against this compelling evidence for defendant, plaintiff marshalls some items which, at best, are as consistent with appellee's view as with appellant's: (1) Midland invited him into the Textured matter and initiated the talks with him. (2) Midland urged him to go to Georgia to look over Textured's situation and then to try to help that company. (3) Textured was very badly off, insolvent, without funds, and both Midland and Noonan recognized this. (4) Defendant agreed that it would try to prevent Textured from collapsing, including the supplying of funds (for operation's as well as for plaintiff's fee), while Noonan was working to rescue. (5) The

amount of Noonan's fee (including the hiring of associates) was discussed and agreed upon with Midland. Each of these pieces of evidence harmonizes with defendant's position that, as a large creditor, it was intensely interested in helping Textured to revive and survive, but that it never went further than to agree to lend additional funds from which the debtor could pay plaintiff along with its other operating expenses. On his side, Noonan, recognizing that Midland would aid Textured with these loans, could very well have believed that he was financially safe in taking on the project for that failing manufacturer.

Finally, appellant puts great stress on a letter in April 1967 from Textured's president which twice refers, tangentially, to plaintiff or his associate as "hired by Midland", in connection with a description of their activities and recommendations. This long letter was an internal Textured communication, "a review and report on activities since our last meeting" by Textured's chief officer to its board of directors; the letter was not directed to Midland which was neither bound by it nor called upon to respond or comment. Besides, in context the word "hired" in the letter seems to have been a colloquial or lay expression for "picked out" or "selected"; after all, Textured did pay plaintiff on his first two invoices and thereby recognized that it had "hired" him in the sense of retaining him.

Like Judge Frankel—giving full credence to plaintiff's factual testimony,[3] to the other evidence in his behalf, and to the inferences reasonably flowing from that evidence—we conclude that, on the record and on the case as tried and presented, there could not be a reasonable difference among jurors as to the making of the contract asserted by appellant. A verdict for plaintiff "could only be the product of surmise, speculation, and conjecture, and could not be derived from fairly weighing.

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3 By factual testimony, we mean the hard facts as to things done or said, not plaintiff's legal conclusions on the stand that he was hired by and had contracted for pay with Midland, rather than Textured.

evidence." *Calvert* v. *Katy Taxi, Inc., supra*, 413 F.2d at 844. That the case was originally sent to the jury which twice reported itself deadlocked, after considerable deliberation, does not mean that the actual disagreement was fair and reasonable. If the position of some jurors favoring plaintiff is enough, there could never be a judgment for insufficiency of the evidence notwithstanding a verdict, nor the direction of judgment on that ground after a mistrial. Both are commonplace and envisaged by Rule 50(b), F.R.C.P.

Affirmed.

Excerpt from the Record—Defendant's Exhibit C[1]

(Letter to F. F. Black, Jr., Vice-President of Midland Capital Corporation and other members of Board of Directors.)

TEXTURED PRODUCTS COMPANY
Elberton, Georgia

April 24, 1967

Mr. F. F. Black, Jr.*
Mr. John Rote
Mr. A. A. Huber
Mr. David H. Gambrell
Mr. Frank C. Southern

Gentlemen:

"During this period we have tried to cooperate with *two gentlemen hired by Midland*[2] to survey the operation.

• • •

"At the suggestion of Mr. Patrick, *the Production expert hired by Midland*,[2] we turned on the plant at a high production rate. This was done and the results are promising.

• • •

"We are under extreme pressure from our accounts payable and are endeavoring to keep them happy through partial payments as money becomes available from Midland and from our sales.

Very truly yours,
s / Robert G. Megaw
President

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* Mr. Black is the vice-president of Midland Capital Corporation who had the portfolio responsibility of the Textured Products account.

1. This letter exhibit, in its entirety, is set out on page 161a of the Appendix used in the Court of Appeals. Said Appendix was certified and transmitted to the Supreme Court by the Clerk of the Court of Appeals for the Second Circuit.

2. "HIRE—to engage the personal services of for a set sum". *Webster's Seventh New Intercollegiate Dictionary.*

Excerpt from Record—Noonan Direct Examination (T-74)*

"A. I am relating at this point what I said.

Q. Good.

A. It was pretty much for quite a while what I said. They were listening, so it was a recitation; that I wasn't at all sure just how much we could do under these circumstances or how much would be involved financially by Midland Capital in addition to what they had already put in to accomplish the goals nor how long it would take.
As a result of which Mr. Schabacher said, "*Nevertheless, we are in this picture for $850,000, and we are not about to withdraw and have everything collapse without our best efforts at doing something.*"

Q. When Mr. Schabacher said "we", do you know to whom he referred?

A. When he said "we", he is referring to Midland Capital Corporation.

Q. The defendant in this case?

A. Yes. In other words, he and his corporation are not about to walk away from $850,000 invested without doing something over and above what was being done. What was being done was obviously not working out."

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* The reference (T-74) etc., refers to page numbers of the Transcript of the Official Stenographer's Minutes, said Transcript was certified and transmitted to the Supreme Court by the Clerk of the Court of Appeals for the Second Circuit.

Excerpt from Record—Noonan Direct Examination (T-89)

"THE COURT: Is that what you are telling us about, conversations with Mr. Schabacher and Mr. Black, on or about April 10?

THE WITNESS: *Exactly, Exactly.* This is the meeting of April 10, the Monday, April 10, after our second trip to Elberton reporting back to him our findings now with the two weeks' retrospect on whether or not we felt we could do anything.

Mr. Patrick felt that he could get the plant into an operating —as an operating unit and get the level of production up to a level which would sustain operation, which level it had not achieved not even by half at this point.

This was reported back to Mr. Schabacker and Mr. Black who —with the further information that while $740,000 was not needed in the next 90 days, which was the request of Mr. McGaw and Textured Products, nevertheless, funds would have to be forthcoming in order to even attempt anything without Midland agreeing to putting up funds, Mr. Patrick's presence on the scene or my presence on the scene would avail nothing any more than what was already happening.

So, with this information by me to Mr. Schabacher, not as precisely as I am giving it to you, over a period of maybe two hours, Mr. Schabacher agreed that Patrick would go down to Textured Products on April – the next day, April 19, what it was, and take over the operations of the plant; that Midland Capital would – Mr. Schabacher or Mr. Black would authorize advancing of funds to Textured Products for operations, based upon a schedule to be submitted by the people at Textured Products and approved by me.

The amounts at that point were not known precisely, but as an initial move I believe $50,000 was advanced. The understanding at that time was that the fees to be paid –

(Objection by Mr. Mishkin)

THE COURT: You tell us what you said and what –

THE WITNESS: I advised Mr. Schabacher that our fee would be $7,500 a month, which would include in part, part of my time, Mr. Patrick's time and part of Crowley's time, which was perfectly satisfactory to Mr. Schabacher –

THE COURT: You just tell us what you said and what–

THE WITNESS: This is what I said to him and he agreed.

THE COURT: What did he say?

THE WITNESS: *"Fine."*

THE COURT: "Fine"?

THE WITNESS: *"Fine."* Insofar as the payment – in as much as Textured had no funds, insofar as the payment is concerned, that the funds would be furnished by Midland Capital to Textured Products in the sum of *$7,500 to pay our fee when the bills were submitted*, and the $7,500 would be added onto and over and above the operating fee – the operating sums needed for the daily operations of payroll for the employees, payroll for Mr. Megaw, payroll for Mr. Southern, interest payments to the bank, insurance – payment on the insurance to keep it alive and whatever the initial $50,000 covered.

Q. After this conversation, were funds transmitted from Midland down to Georgia?

A. Yes.

Excerpt from Record—Noonan Direct Examination (T-150)

"THE COURT: Well I won't sustain the objection in that form, but I will strike the testimony as it was given.

In that passive mode, Mr. Noonan, the bill was submitted. I am not sure it conveys a precise meaning to the jury or to me. You did something with that bill or somebody did something in connection with somebody else; tell us about that. You understand the distinction?

THE WITNESS: I do, sir.

THE COURT: You may tell us what happened in the active kind of sense.

THE WITNESS: *I personally advised Mr. Schabacher and Mr. Black that I would submit my first bill in May for $7,500 to cover the services for April and please make the funds available for its payment. They did so.*

THE COURT: When did this happen?

THE WITNESS: This happened the last week of May, 1967."

Excerpt from Record—Noonan Direct Examination (T-162)

"Q. What was said by you and what was said by him, to the best of your recollection?

A. The gist of the conversations were thus; that our bills be submitted. Our bills were not paid, and we were looking forward to the continuation – I was looking forward to the payment coming back and the continuation of the arrangement.

Mr. Black and Mr. Schabacher both assured me that the bills would be taken care of, but to be patient, because they were attempting to sell the facility, the plant, to another buyer, who would buy it as a going business, and please be patient.

Q. Were any of those reports that you submitted to Mr. Schabacher for the purpose of such a sale?

A. Exactly. The two reports submitted, the titles of which I just read, one submitted October 4th and the other on October 11th, were both prepared for Midland Capital for the express purpose of –

MR. MISHKIN: I object to the characterization of the purpose.

THE WITNESS: They were asked – I was asked to prepare reports for the purpose –

THE COURT: When you say you were asked, they told you what kind of reports they wanted? Is that what you are saying?

THE WITNESS: Yes.

THE COURT: All right. I will allow that."

Excerpt from Record—Noonan Direct Examination (T-164)

"Q. Mr. Noonan, did you, subsequent to this telephone conversation with Mr. Black at his New Jersey home, have any conversation with Mr. Schabacher with regard to these bills?

A. Yes.

Q. When?

A. During the period – I personally submitted to Mr. Schabacher, –

THE COURT: No. The question is, when, if you know.

THE WITNESS: One date that I know of was October – on or about October 14th, when I personally rendered the report, the first report on the review of the facilities and operations. I personally gave it to Mr. Schabacher in his office.

Q. What was the conversation?

A. The conversation – at that time, Mr. Schabacher did not read the report.

Q. No. I am talking with regard to the bill and payment thereof.

A. *Again, in regard to the bill, please be patient we are negotiating with various people for the sale of the whole business, the whole plant and the whole facility, please be patient.*

Q. This is Mr. Schabacher talking?

A. Mr. Schabacher."

Excerpts from Judge's Charge to the Jury (T-486)

"Now, in looking for the answer to that ultimate question, you won't look only at the direct testimony here about what was said or what is alleged to have been said at those meetings, and especially at the meeting of April 10. *You will undoubtedly want to consider — and both counsel have urged in their respective ways that you consider — all the surrounding circumstances in your effort to decide which account of these dealings is more probable.*

So, for example, you may take into account the extent to which or the fact that the plaintiff submitted his bills to Textured Products rather than to the defendant. *You may weigh with that circumstances the contention that Midland was nevertheless the party that had agreed expressly to make the payments itself as the company directly and primarily responsible to the plaintiff.*

It is for you to judge ultimately whether the payments made by Textured Products reflect the real essence of the deal *or whether the defendant, Midland, had undertaken the primary obligation in spite of the fact that the payments were made by and the bills were rendered to Textured Products Company.*" (T-498)

"*You may take into account the precarious financial condition of Textured Products at the time or times in question.*

You may consider whether the plaintiff in all the circumstances could reasonably have been looking to that company for payment, having in mind, among other things, that as part of his engagement Midland had indicated its willingness to advance further loans to Textured Products." (T-500)

"I remind you, I think, for the last time, that whatever I suggest to remind and guide you, it is your judgment about the facts that controls in the last analysis." (T-501)

"I remind you of this simply as one of many factors about which you will exercise your common sense judgment in appraising these witnesses and figuring out how far you can rely on each of them and for what." (T-506)

"As to the form of your verdict, it is a simple matter in this case. It may be, on the one hand, a verdict for the plaintiff in which event it must be a verdict in his favor, with an amount you will state under the instructions I have given you about the measure of damages.

On the other hand, it may be a verdict for the defendant, which will be simply that and nothing more." (T-506)